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MOHD ARIF AB RAHMAN v. PP

HIGH COURT MALAYA, SHAH ALAM
NOORIN BADARUDDIN J
[CRIMINAL APPEAL NO: BA-42(Ors)-5-01-2019]
26 JUNE 2020

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CRIMINAL PROCEDURE: *Forfeiture – Appeal against – Appeal against forfeiture of properties – Whether money subject matter of corruption offence – Whether there were paper trails or money trail to form connection of money to offence – Discrepancies in witnesses' averments – Whether there was sufficient evidence to support conclusion money obtained as a result of or in connection with corruption offence – Malaysian Anti-Corruption Commission Act 2009, s. 41(1)*

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EVIDENCE: *Standard of proof – Forfeiture – Forfeiture proceedings – Action in forfeiture proceedings related to action in rem – Whether there was prosecution or conviction for offence – Determination of whether properties claimed subject matter of or was used in commission of offence – Balance of probabilities – Malaysian Anti-Corruption Commission Act 2009, s. 41(1)*

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This was an appeal against the decision of the Sessions Court Judge ('SJ') allowing the respondent's application to forfeit, among others, cash, gold, watches and some handbags from the appellant, his wife and children pursuant to s. 41(1) of the Malaysian Anti-Corruption Commission Act 2009 ('the Act'). The appellant was holding the position as Chief Secretary in the Ministry of Rural and Development ('KKLW'). Prior to his posting to KKLW, the appellant was the Chief Secretary in the Ministry of Agriculture ('MOA'). KKLW had a programme 'Program Pengedaran Beras Bersubsidi Super Tempatan 15% Hancur' ('the ST15 programme') launched by MOA in 2008. Only qualified companies would be appointed by MOA as wholesaler and subsidised rice dealers under the ST15 programme. Premised on the investigation by the investigating officer ('IO'), the allegations against the appellant were triggered with what was gathered from one Ter Thian Tin ('Thian Tin'), a director of a company, THC Sdn Bhd. It was averred by the IO that Thian Tin confirmed that sometime in September 2015, Thian Tin was offered by one Ibrahim Mat Amin ('Ibrahim') that he would be able to obtain increase in the subsidised rice quota for THC Sdn Bhd. In return, THC Sdn Bhd would have to pay RM300 per tonne of rice received from BERNAS and that the said payment was for a political secretary who was assisting in increasing the rice quota under the ST15 programme. The appellant was tasked to handle the committee relating to the ST15 programme ('the committee') which was set up and approved by the MOA. As the chairman of the committee, the appellant's duties and responsibilities, amongst others, were to discuss new quota applications and segragation to the wholesaler and rice distributor relating to the ST15 programme. The IO averred that the appellant had confirmed that all matters relating to the ST15

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programme must only be dealt with one Datuk Mohd Zaidi Mohd Said ('Datuk Zaidi'), the then special officer to the Minister. The IO stated that the appellant had admitted to taking money from Datuk Zaidi which was obtained from the rice wholesaler involved in the ST15 programme amounting to RM3.1 million in cash ('the money') through a series of payments made at a hotel. The appellant was further stated to have failed to declare the money he had received, including various items. The appellant, on the other hand, averred that the money he received from Datuk Zaidi belonged to the Minister for the Minister to use as a Member of Parliament for Bera, Pahang Constituency. The appellant admitted that he had returned RM911,000 to the Minister. In regard to the foreign currencies found in the appellant's premise, the appellant stated that they belonged to his family members and were collected during their frequent overseas travels and in relation to the handbags seized, it was averred that they were fake products purchased from China and from second hand factory outlets during family vacations abroad. Summarily, in applying the balance of probabilities test, the SJ found that the appellant had failed to prove that the properties sought to be forfeited by the respondent was not connected to an offence under the Act and why they should not be forfeited. The respondent's application was allowed. Hence, this appeal. The issues raised by the appellant were (i) that the SJ had applied the wrong burden of proof or standard of proof; and (ii) that there were inconsistencies in the averments made by the IO and the SJ had wrongly admitted the statement given by the appellant to the Malaysian Anti-Corruption Commission as the statement was inadmissible in a forfeiture proceeding.

Held (allowing appeal):

(1) Section 41 of the Act is a self-contained provision which specifically relates to a claim made by a person claiming to have interest in property which is not subject to any prosecution or conviction for an offence under the Act. The provision therefore could not be said to be a penal provision altogether as it is a provision relating to an action *in rem*, unlike a penal provision which is by nature, an action *in personam*. It was therefore clear that pursuant to the provision of s. 41(2), the person who claims to have an interest in the property ('the claimant') is to show cause to the judge to whom an application is made under s. 41(1) as to why the property should not be forfeited. There was a burden on the appellant as the claimant to show on a balance of probabilities that the properties he claimed were acquired legally and as such the properties should not be forfeited as provided under s. 41(2) of the Act. (para 31)

(2) Since the action in forfeiture proceedings under the Act relates to action *in rem* and there was no prosecution or conviction for an offence, the standard of proof to be applied by the court in determining whether the properties claimed were the subject matter of or was used in the

commission of an offence and there was no purchase in good faith for valuable consideration in respect of the properties, was on a balance of probabilities. As such, the SJ had not erred in applying the standard of balance of probabilities in deriving to her findings. (para 32)

(3) There was no substantial connection or evidence between the monies received by the appellant with the offence or that the money was the subject matter of an offence. The IO's affidavit did not disclose nor exhibit any statements by Thian Tin. Further, the discrepancies in the IO's averments were material since the allegation against the appellant was related to the quota said to have been increased and given to THC Sdn Bhd and consequently payments were made by THC Sdn Bhd to several persons including the appellant. No paper trails or money trail was made available to show any form or the connection of the money to an offence under the Act said to have been received by the appellant. There was no affidavit or documentary evidence showing the nexus between what was alleged by the respondent with the money and no person was mentioned in the IO's affidavit being charged for any offence involving the ST15 programme. It was incumbent on the respondent to show the corrupt activity involving the money with documentary evidence and not purely on what the IO averred and what Thian Tin had said. No documentary evidence was produced to show movement or money trail from THC Sdn Bhd to Datuk Zaidi and ultimately to the appellant. There must be clear identification of what is ill-gotten money and legally obtained money as well as substantial connection between the money and the offence. (paras 43, 44, 47 & 48)

(4) Pursuant to s. 53(1) of the Act, the appellant's statement was a privileged document and was only admissible in a trial or inquiry by a court into an offence under the Act and ought to be excluded in the forfeiture proceeding before the Sessions Court. (para 46)

(5) It was incumbent upon the respondent, as the applicant in the Sessions Court, to prove that the money was used in the commission of an offence under the Act. The respondent further failed to detect or trail the movement of the money. The respondent merely relied on the witness statements pursuant to s. 53 of the Act. The connection of the money with the offence must first be proven by the respondent. Neither was there evidence to show that the handbags were purchased using the money. There was no obligation in law for the appellant instead to produce evidence that the bags were fake branded handbags. The obligation rested with the respondent, as they were the party who alleged, and the fact that the respondent failed to refute the appellant's averment was fatal. (paras 53 & 54)

(6) There was insufficient judicial appreciation of the evidence on the part of the SJ even before the court assessed or considered the explanation given by the appellant. Reliance of what other witnesses had stated during investigation and on admission by the appellant without documentary evidence were insufficient to support a conclusion that the money had been obtained by the appellant as a result of or in connection with an offence under the Act. (para 56)

Case(s) referred to:
In Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35 ***(refd)***
Jason Chan Huan Sen & Ors v. PP [2015] 2 CLJ 605 CA ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Muthukrishnan Suppiah v. Menteri Hal Ehwal Dalam Negeri Malaysia & Ors And Another Application [1994] 4 CLJ 568 HC ***(refd)***
Parameswaran Alagu v. Timbalan Menteri Dalam Negeri & Ors [2017] 1 LNS 570 HC ***(refd)***
PP v. Awalluddin Sham Bokhari [2018] 1 CLJ 305 FC ***(refd)***
PP v. Billion Nova Sdn Bhd & Ors [2016] 2 CLJ 763 CA ***(refd)***
PP v. Kuala Dimensi Sdn Bhd & Ors [2019] 3 CLJ 650 CA ***(refd)***
PP v. Lim Kim Hoei & Anor [2014] 4 CLJ 816 CA ***(refd)***
PP v. Thong Kian Oon & Ors [2012] 8 CLJ 119 HC ***(refd)***
Ratna Ammal v. Tan Chow Soo [1967] 1 LNS 137 FC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

Legislation referred to:
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, s. 56
Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 4, 56(1)
Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 32, 35
Evidence Act 1950, ss. 101, 102
Federal Constitution, art. 13
Malaysian Anti-Corruption Commission Act 2009, ss. 23, 26, 30, 36(3), 41(1), (2), 53(1), (3)

For the applicant - Guok Ngek Seong; M/s Guok Partnership
For the respondent - Mohd 'Afif Ali; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Noorin Badaruddin J:

[1] This is an appeal against the decision of the learned Sessions Court Judge on 17 January 2019 allowing the respondent's application to forfeit among others cash, gold, watches and some handbags from the appellant, his wife and children pursuant to s. 41(1) of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) ("the Act").

A **Background Facts**

[2] The appellant was holding the position as Chief Secretary in the Ministry of Rural and Development (or Kementerian Luar Bandar dan Wilayah) ("KKLW"). Prior to his posting to KKLW, the appellant was the Chief Secretary in the Ministry of Agriculture ("MOA").

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[3] KKLW had a programme called "Program Pengedaran Beras Bersubsidi Super Tempatan 15% Hancur" ("the ST15 programme") launched by MOA in 2008. Only qualified companies would be appointed by MOA as wholesaler and subsidised rice dealers under the ST15 programme.

C **[4]** Premised on the investigation by the investigating officer ("the IO"), the allegations against the appellant were triggered with what was gathered from one Ter Thian Tin ("Thian Tin"), a director of a company, THC Sdn Bhd.

[5] Thian Tin is averred to have admitted that on 25 November 2014, D THC Sdn Bhd was terminated as a wholesaler and rice distributor in respect of the ST15 programme. Sometime in February 2015, Thian Tin contacted one Ab Ralim @ Mat Dehan bin Mat ("Ralim") to inform him about THC Sdn Bhd's termination as a wholesaler and rice dealer under the ST15 programme. Ralim was said to be able to reinstate THC Sdn Bhd as a E wholesaler under the ST15 programme with a consideration of RM350 to RM400 per tonne of rice.

[6] According to the IO, Thian Tin was informed by Ralim that the said payment was to be paid to a politician. One Datuk Zaidi's name was mentioned in the said meeting between Thian Tin and Ralim.

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[7] THC Sdn Bhd was subsequently reinstated as a wholesaler and rice distributor under the ST15 programme from February 2015 to December 2015 through the assistance of Ralim. THC Sdn Bhd was stated to have been given a quota of 50 to 200 tonnes a month. Thian Tin was stated to have confirmed that Ralim was paid the sum of RM270,000 in four tranches.

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[8] It was further averred by the IO that Thian Tin confirmed that sometime in September 2015, Thian Tin was offered by one Ibrahim bin Mat Amin ("Ibrahim") that he would be able to obtain increase in the subsidised rice quota for THC Sdn Bhd. In return, THC Sdn Bhd would have to pay H RM300 per tonne of rice received from BERNAS and according to Ibrahim the payment of RM300 per tonne was for a political secretary who was assisting in increasing the rice quota under the ST15 programme. The IO further averred that according to Thian Tin, from November 2015 to December 2015, THC Sdn Bhd's rice quota under the ST15 programme was increased to 650 tonnes after getting the assistance from Ibrahim. Thian Tin I was stated to have confirmed further that a sum of RM468,000 was paid to Ibrahim in three tranches.

[9] The appellant was tasked to handle the committee relating to the ST15 programme ("the committee") known as "Jawatankuasa Induk Mengenai Hal Ehwal Industri Padi dan Beras". The committee was set up and approved by the MOA. The Minister of the MOA at the material time was Dato Seri Ismail Sabri bin Yaakob who held the post from 2013 to 2015 ("the Minister").

[10] As the chairman of the committee, the appellant's duties and responsibilities amongst others were to discuss new quota applications and segregation to the wholesaler and rice distributor relating to the ST15 programme. Based on the minutes of meetings, the appellant had chaired ten committee meetings from November 2014 to October 2015.

[11] The IO further avers that the appellant had confirmed that all matters relating to the ST15 programme must only be dealt with one Datuk Mohd Zaidi bin Mohd Said ("Datuk Zaidi"), the then special officer to the Minister.

[12] The IO stated that the appellant had admitted to taking money from Datuk Zaidi which was obtained from the rice wholesaler involved in the ST15 programme amounting to RM3.1 million in cash ("the money") through series of payments made at the Royal Bintang Hotel Kuala Lumpur. The appellant was further stated to have failed to declare the money (in different denominations) he had received, including various items such as gold, watches and branded handbags.

[13] The appellant on the other hand avers that the money he received from Datuk Zaidi belonged to the Minister for the Minister to use as a Member of Parliament for Bera, Pahang constituency. The appellant had admitted that out of the RM1.3 million, he had returned RM911,000 to the Minister.

[14] In regards to the foreign currencies found in the appellant's premise, the appellant stated that they belonged to his family members and were collected during their frequent overseas travels. In relation to the handbags seized, it is averred that they are fake products purchased from China. Some were said to have been purchased in the second hand factory outlets by his family members during their vacations abroad.

Findings By The Learned Sessions Court Judge

[15] Summarily, in applying the balance of probabilities test, the learned Sessions Court Judge found that the appellant had failed to prove that the properties sought to be forfeited by the respondent was not connected to an offence under the Act and why they should not be forfeited. In relying on the affidavit evidence of the IO, the learned Sessions Court Judge was of the view that such evidence was not hearsay. The respondent's application was allowed on 17 January 2019.

A **The Appeal**

[16] On behalf of the appellant, it is submitted that the learned Sessions Court Judge had applied the wrong burden of proof or standard of proof in the present case. It was argued that when the learned Sessions Court Judge stated, "atas imbangan kebarangkalian, saya berpuas hati dan bersetuju serta
B sependapat ... bahawa harta terlibat iaitu hal perkara suatu kesalahan di bawah APSRM2009 dan tiada pembelian suci hati dengan balasan berharga berkenaan harta-harta tersebut.", it is unclear as to whether she was referring to burden of proof or standard of proof. Learned counsel for the appellant submitted that there is a difference between the terms "burden of proof" and
C "standard of proof".

[17] According to the appellant's learned counsel, burden of proof relates to the burden or obligation of proving a fact on the party who exerts the existence of any fact in issue and wishes the court to believe in its existence while standard of proof refers to the "degree of persuasion which the tribunal
D must feel before it decides that the fact in issue did happen". (Two authorities were cited in support of the argument; *In Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35 per Lord Hoffmann at para. 4 of the report and the Federal Court decision in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1 at paras. 4 to 7 of the report).

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[18] It is contended further that if the learned Sessions Court Judge holds the burden of proof is on the balance of probabilities, she had erred in law as the burden of proof is argued to be on the respondent as the applicant pursuant to ss. 101 and 102 of the Evidence Act 1950.

F **[19]** It is argued that as the Act is a criminal statute which provides for criminal sanctions against any perpetrators, unless the Act expressly reverses the burden of proof or states the burden of proof as otherwise, the burden of proof always lies on the respondent.

[20] In the alternative, it was argued that even if the learned Sessions Court
G Judge holds that the standard of proof (as opposed to burden of proof) has been discharged by the respondent on the balance of probabilities, the learned Sessions Court Judge still erred in law as the appellant takes the position that the appropriate standard of proof to be applied in the present case is beyond reasonable doubt and anything short of the beyond reasonable
H doubt standard of proof is erroneous.

[21] It is further submitted that as the Act does not provide for a proper standard of proof to be required for forfeiture of properties, a construction which is more favourable to the appellant should be applied, ie, the beyond reasonable doubt standard.

I **[22]** Learned counsel submits that unlike s. 56 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATPUA") which clearly provides for the standard of proof

to be that of a civil burden (ie, balance of probabilities), s. 41 of the Act does not provide the required standard of proof. Therefore it is submitted that in the absence of such provision, the court should adopt another canon of interpretation ie, that a penal statute should be construed strictly and in the case of doubt the benefit must be afforded to the appellant. It is further argued that such interpretation is required since the order for forfeiture would result in deprivation of a persons rights to property which is a constitutional right guaranteed by art. 13 of the Federal Constitution. In light of art. 13 of the Federal Constitution, it is contended that the courts should demand a higher standard of proof before granting a forfeiture in the absence of an express provision on the standard of proof required in the Act.

[23] The second ground of appeal raised by the appellant relates to the evidence produced by the respondent. It is submitted that there were inconsistencies in the averments made by the IO and that the learned Sessions Court Judge had wrongly admitted the statement given by the appellant to the Malaysian Anti-Corruption Commission ("MACC") as the statement is inadmissible in a forfeiture proceeding.

Findings

[24] Section 41 of the Act states:

> Forfeiture of property where there is no prosecution for an offence
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> 41. (1) Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Public Prosecutor may, before the expiration of eighteen months from the date of the seizure, apply to a Sessions Court Judge for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under this Act.
>
> (2) The Judge to whom an application is made under subsection (1) shall cause to be published a notice in the *Gazette* calling upon any person who claims to have an interest in the property to attend before the Court on a date specified in the notice, to show cause as to why the property should not be forfeited.
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> (3) Where the Judge to whom an application is made under subsection (1) is satisfied:
>
> (a) that the property is the subject matter of or was used in the commission of an offence under this Act; and
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> (b) there is no purchase in good faith for valuable consideration in respect of the property, he shall make an order for the forfeiture of the property.
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> (4) Property in respect of which no application is made under subsection (1) shall, at the expiration of eighteen months from the date of its seizure, be released to the person from whom it was seized.

[25] Section 41(1) of the Act is in *pari materia* with s. 56(1) of AMLATPUA *albeit* there is a clear mention of the standard of proof required in civil proceedings in the latter provision. Section 56 of AMLATPUA states:

> Forfeiture of property where there is no prosecution
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> 56. (1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is:
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> (a) the subject-matter or evidence relating to the commission of such offence;
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> (b) terrorist property;
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> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence.
>
> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied:
>
> (a) that the property is:
>
> (i) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
>
> (ii) terrorist property;
>
> (iii) the proceeds of an unlawful activity; or
>
> (iv) the instrumentalities of an offence; and
>
> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.
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> (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.
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> (4) In determining whether the property is:
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> (a) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
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> (d) the instrumentalities of an offence,
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> the court shall apply the standard of proof required in civil proceedings.

[26] In *PP v. Awalluddin Sham Bokhari* [2018] 1 CLJ 305, the Federal Court in dealing with an appeal involving an application of a forfeiture of property pursuant to s. 56(1) of Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLATFA") stated the followings:

> [31] In an application for an order of forfeiture of property under s. 56(1) where there is no prosecution, the standard of proof to determine whether the property has been obtained as a result of or in connection with an offence under s. 4(1) is the standard of proof required in civil proceedings. Any question of fact to be decided by the court in proceedings under the Act shall be decided on the balance of probabilities: See s. 70(1) of the Act.

[27] In *PP v. Awalluddin Sham Bokhari* (*supra*), the Federal Court allowed the appeal by the Public Prosecutor and found that the learned trial judge's findings that the respondent therein obtained the properties out of the proceeds of an unlawful activity was based on evidence before him. The respondent was found to have failed to rebut the evidence given against him on the balance of probabilities. The Federal Court held as follows:

> The Court of Appeal was also in error in failing to consider the rebuttal evidence of witnesses called by the appellant. The learned trial judge's findings that the respondent obtained the properties out of the proceeds of an unlawful activity was based on evidence before him. The respondent failed to rebut the evidence against him on balance of probabilities.

[28] This court is further guided by the 4:1 majority decision of the Court of Appeal in *Jason Chan Huan Sen & Ors v. PP* [2015] 2 CLJ 605; [2015] 1 MLJ 701, a case involving some seized properties forfeited by the Sessions Court pursuant to s. 32 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ("DDA (FOP)") on the grounds that the properties were illegal properties obtained through prohibited or illegal activities. In that case, the issue on appeal *inter alia* was on the applicability of presumption of illegal property under s. 35 of the DDA (FOP). Section 32 of the DDA (FOP) states as follows:

> Forfeiture of property seized under this Act where there is no prosecution, or no proceedings under Part III or no claim thereto
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> 32. (1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and:
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> (a) no prosecution for any offence under any law is instituted with regard to such property;
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> (b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and
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> (c) no claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952, within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months.

(2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in paragraph (1)(c), the Public Prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a Sessions Court for its decision.

(3) The Sessions Court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.

(4) The provisions of this section shall be without prejudice to the power of a police officer to release from seizure any property under section 31.

(5) Where property has been forfeited under subsection (1), it shall not be a bar to any prosecution for an offence under any law being instituted in respect of such property at any time thereafter.

[29] Section 35 of the DDA (FOP) which falls under Part VI relating to evidence and procedure, reads:

Presumption as to liable person and illegal property

35. Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

[30] His Lordship Abang Iskandar JCA (as His Lordship then was) in delivering the majority judgment found as follows:

[59] Let us now look at the situation in the *Cherian*'s case, but before we go there, we would like to look at some of the cases cited by the learned deputy in his written submissions which had made pronouncements on the effect of s. 35 of the FOP. One of the earlier cases that had made a ruling on the inter-play between ss. 35 and 32(3) of the FOP has been the case of *Public Finance Bhd v. Public Prosecutor* [1999] 4 MLJ 143; [1999] 8 CLJ 485 where the learned judge there had held that '... the proceedings under s. 32(3) is a proceeding within the meaning of 'any proceedings' in respect of any illegal property under s. 35 of the Act.' In respect of this contention, the learned deputy had submitted before us that as such the presumption of illegal property must be invoked against the property in the s. 32(3) proceedings and went on to submit that:

> Malahan jika dilihat s. 35 memperuntukkan 'against proves to the contrary by admissible evidence' dan s. 32(3) juga memperuntukkan perkara yang sama iaitu 'upon proof that he is lawfully entitled thereto'.
>
> [60] At this juncture, suffice for us to say that those two phrases differ in substance and material particulars in relation to the burden of proof that pertains to each of the situations that was adverted to. We note that the former phrase has its origin under s. 35 while the latter phrase has its origin from s. 32(3) of the FOP Act. Clearly, *ex facie*, they do not provide for the same nature of evidential proof. While the former phrase is a consequence of a statutory presumption, where the nature of the evidence that is required from the liable person is in the nature of rebuttal evidence, the latter phrase requires affirmative proof coming from the claimant that he is lawfully entitled to the property, in the course of proving which he has to lead affirmative evidence to satisfy the Sessions Court Judge that the property that is being claimed by him is not illegal property. Therefore, there is no clear intention that could be derived from the wordings under s. 32(3) that in order to prove that the property is lawfully his, the claimant is also required to prove a negative, in that the property was not illegal property. *The burden on the claimant to satisfy the Sessions Court is one that is on the balance of probabilities and if the Sessions Court is not persuaded by the claimant's proof that would mean that the claimant has failed to discharge the onus on him and the Sessions Court must then order that the seized property be forfeited to the government revenue.* (emphasis added)

[31] In construing the provision and in light of the entire provisions of the Act, this court is of the considered view that s. 41 of the Act is a self-contained provision which specifically relates to a claim made by a person claiming to have interest in property which is not subject to any prosecution or conviction for an offence under the Act. The provision therefore cannot be said to be a penal provision altogether as it is a provision relating to an action *in rem*, unlike a penal provision which is by nature, an action *in personam*. It is therefore clear that pursuant to the provision of s. 41(2), the person who claims to have an interest in the property ("the claimant") is to show cause to the judge to whom an application is made under sub-s. 41(1) as to why the property should not be forfeited. It is of the considered view that although s. 41 of the Act is silent as to the burden or standard of proof to be applied, based on the decisions of the apex court stated in the above, there is a burden on the appellant as the claimant to show on balance of probabilities that the properties he claimed were acquired legally and as such the properties should not be forfeited as provided under s. 41(2) of the Act.

[32] Since the action in forfeiture proceedings under the Act relates to action *in rem* and there is no prosecution or conviction for an offence the standard of proof to be applied by the court in determining whether the properties claimed are the subject matter of or was used in the commission of an offence and there is no purchase in good faith for valuable consideration

in respect of the properties is on balance of probabilities. As such, this court finds that the learned Sessions Court Judge has not erred in applying the standard of balance of probabilities in deriving to her findings when she stated in her judgment:

> Setelah saya meneliti affidavit-affidavit, ekshibit-ekshibit yang dikemukakan dan juga hujahan pihak TPR Pemohon dan Peguambela Responden bersama-sama nas undang-undang berkaitan atas imbangan kebarangkalian, saya berpuas hati dan bersetuju serta sependapat … bahawa harta terlibat iaitu hal perkara suatu kesalahan di bawah ASPRM 2009 dan tiada pembelian sucihati dengan balasan berharga berkenaan harta-harta tersebut.

[33] It is pertinent to note that in the Sessions Court, from the submissions made by learned counsel, the appellant had taken the stand that the test to be applied is on balance of probabilities. The written submissions made on behalf of the appellant who was the respondent therein found in the appeal record (vol. 4) states:

> D. Beban Pembuktian
>
> 8. Adalah menjadi tugas MYMI di akhir Notis Permohonan tersebut untuk memutuskan samada Pemohon telah Berjaya membuktikan "on balance of probabilities" bahawa harta-harta yang dipohon adalah merupakan hal perkara kesalahan di bawah Akta SPRM.

[34] It is therefore perplexing that on appeal herein, a different stand is taken on behalf of the appellant as to the burden of proof and/or standard of proof.

[35] Balance of probabilities had been stated by the Federal Court in *Ratna Ammal v. Tan Chow Soo* [1967] 1 LNS 137; [1967] 1 MLJ 296 as follows:

> … When one speaks of court having to be satisfied on the balance of probability one means that the higher degree of probability favours the conclusion since, if the probabilities were equally balance, the court would not have been satisfied on a balance of probability.

[36] In *Miller v. Minister of Pensions* [1947] 2 All ER 372, balance of probabilities was explained as follows:

> If the evidence is such that the tribunal can say 'we think it is more probable than not' the burden is discharged but if the probabilities are equal, it is not.

[37] The appellant as the claimant in the present matter in satisfying the court on balance of probabilities, must adduce sufficient credible evidence as stated by the Court of Appeal in *PP v. Lim Kim Hoei & Anor* [2014] 4 CLJ 816 as follows:

> Bearing in mind that since section 32(3) are not forfeiture proceedings under the Act, the question of the property claimed being presumed to be an illegal property under section 35, unless it is proved to the contrary

by the respondents, does not arise at all. The only burden of the respondents is to adduce sufficient credible evidence that the properties were acquired by the through lawful means and that they were lawfully entitled to such properties.

[38] Having ruled on the burden and standard of proof, this court has examined the affidavits filed to determine whether the appellant has shown on balance of probabilities that the properties were acquired legally and why the property should not be forfeited. This court is also entitled to review the evidence adduced to determine whether the learned Sessions Court Judge was in error in being satisfied that the properties were acquired as a result of or in connection with an offence under the Act (ie, ss. 26 and 36(3) of the same Act) and there was no purchase in good faith for valuable consideration in respect of the properties.

[39] In her judgment, the learned Sessions Court Judge arrived at her findings after being satisfied and in agreement with the submissions made by the respondent who was the applicant before the Sessions Court. The learned Sessions Court Judge stated:

38. Setelah saya meneliti afidavit-afidavit, eksibit-eksibit yang dikemukakan dan juga hujahan pihak TPR Pemohon dan Peguambela Responden bersama-sama nas undang-undang berkaitan atas imbangan kebarangkalian, saya berpuas hati dan bersetuju serta sependapat dengan hujahan pihak Pemohon bahawa harta terlibat ialah hal perkara suatu kesalahan di bawah ASPRM 2009 dan tiada pembelian suci hati dengan balasan berharga berkenaan harta-harta tersebut.

[40] It could be gleaned that the findings made by the learned Sessions Court Judge had been based purely on the investigation of the IO *via* the affidavit filed. In her grounds, the learned Sessions Court Judge stated:

Hujahan Pemohon/Pendakwa Raya

8. Pegawai penyiasat Suruhanjaya Pencegahan Rasuah (SPRM) dalam kes ini ialah Muhammad Halim bin Juhari (rujuk Afidavit di Kandungan 3). Beliau telah menjalankan siasatan terhadap Responden berhubung pemilikan harta yang menjadi hal perkara kesalahan di bawah s. 26 ASPRM 2009.

9. Hasil siasatan mendapati ...

[41] The respondent herein argues that since the IO is vested with the power to investigate under s. 30 of the Act and had taken statements from witnesses, the averments by the IO are admissible evidence showing that the properties were subject matter of or used in the commission of an offence under ss. 26 and 36(3) of the Act. The learned Senior Federal Counsel on behalf of the respondent relied heavily on the decision of the High Court in *Muthukrishnan Suppiah v. Menteri Hal Ehwal Dalam Negeri Malaysia & Ors And Another Application* [1994] 4 CLJ 568 where the High Court held that the provisions of the Evidence Act 1950 in relation to hearsay rule do not apply

to affidavits and the Federal Court's decision in *PP v. Awalluddin Sham Bokhari* (*supra*) where the court was satisfied with the affidavit evidence deposed by the investigating officers as all the information contained therein were true and within their knowledge.

[42] However, in *PP v. Awalluddin Sham Bokhari*, the Federal Court was satisfied with the affidavits filed by the investigating officers as they were supported with documentary evidence to show that the properties sought to be forfeited were proceeds of an unlawful activity. The Federal Court stated:

> The Court of Appeal was also in error in failing to consider the rebuttal evidence of witnesses called by the appellant. The learned trial judge's findings that the respondent obtained the properties out of the proceeds of an unlawful activity was based on evidence before him. The respondent failed to rebut the evidence against him on balance of probabilities.

[43] In the present matter, this court finds there is no substantial connection or evidence between the monies received by the appellant with the offence or that the money is the subject matter of an offence.

[44] It is important to highlight that the IO's affidavit did not disclose nor exhibit any statements by Thian Tin. Presumably the argument would be such statement is a privilege document. However, apart from the fact there are no substantive documentary evidence to show the connection between the money and the offence or to show that the money is the subject matter of an offence, this court agrees with the submissions made by the appellant's learned counsel that there is inconsistency in the averment of the IO with exh. MHJ-3 in the IO's affidavit. Exhibit MHJ-3 consists of minutes of meetings held by the committee relating to the total quota allocated to the companies including to THC Sdn Bhd. The total quota stated to have been allocated to THC Sdn Bhd was only 1200 tonnes from February to December 2015. However, the IO avers that through the assistance of Ralim, THC Sdn Bhd would be getting between 50 tonnes to 200 tonnes (total of RM550 tonnes) monthly from February 2015 to December 2015. According to the IO further, through the assistance of Ibrahim, THC Sdn Bhd should be getting 650 tonnes from November and December 2015. Therefore, the total sum would be 1850 tonnes. There is no explanation by the IO as to the discrepancy in his averment with the figure tabulated during the committee meeting which shows that THC Sdn Bhd was only allocated with 350 tonnes for December 2015 and from February to December 2015 the total amount allocated to THC Sdn Bhd was only 1200 tonnes. The discrepancies are material since the allegation against the appellant relates to the quota said to have been increased and given to THC Sdn Bhd and consequently payments were made by THC Sdn Bhd to several persons including the appellant.

[45] Secondly, the learned Sessions Court Judge had taken into consideration the appellants statement given to the MACC exhibited in the IO's affidavit (exh. MHJ-AA at pp. 717 to 722, Vol. 3D of the appeal

record). The appellant's statement was taken pursuant to s. 53(3) of the Act when he was arrested for an offence under s. 23 of the Act. Section 53(1) of the Act states as follows:

> Admissibility of statements by accused persons
>
> 53. (1) In any trial or inquiry by a court into an offence under this Act, any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of an investigation or not and whether or not wholly or partly in answer to question, by an accused person to or in the hearing of any officer of the Commission, whether or not interpreted to him by any other officer of the Commission or any other person, whether concerned or not in the arrest of that person, shall, notwithstanding any written law or rule of law to the contrary, be admissible at his trial in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

[46] It is therefore clear that pursuant to s. 53(1) of the Act, the appellant's statement is a privilege document and is only admissible in a trial or inquiry by a court into an offence under the Act and ought to be excluded in the forfeiture proceeding before the Sessions Court.

[47] The appellant avers that he received the money from one Datuk Zaidi and that the money was for him to keep as stakeholder for the Minister for purposes of serving the Minister's constituency in Bera, Pahang. It is the respondent's case that the money and the things seek to be forfeited relate to corrupt money kept by the appellant on behalf of a political secretary. No paper trails or money trail is made available to show any form or the connection of the money to an offence under the Act said to have been received by the appellant. There is no affidavit or documentary evidence before the court showing the nexus between what is alleged by the respondent with the money and no person is mentioned in the IO's affidavit being charged for any offence involving the ST15 programme. It is incumbent on the respondent to show the corrupt activity involving the money with documentary evidence and not purely on what the IO avers and what one Thian Tin had said. No documentary evidence is produced to show movement or money trail from THC Sdn Bhd to Datuk Zaidi and ultimately to the appellant.

[48] The appellant had further stated that he had returned RM911,000 to the Minister for the Minister to use for development purposes of the people in Bera constituency in Pahang where the Minister is the people's representative. There must be clear identification of what is ill-gotten money and legally obtained money as well as substantial connection between the money and the offence.

[49] This court finds that the averments made by the appellant must be considered as it was not refuted expressly by the respondent. The case of *Parameswaran Alagu v. Timbalan Menteri Dalam Negeri & Ors* [2017] 1 LNS 570 cited on behalf of the appellant is relevant. In that case the court stated:

> The principles governing the evaluation of affidavit evidence have been spelt out in numerous cases. In the oft cited case of *Ng Hee Tong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609, the Court of Appeal held that where one party makes a positive assertion upon a material issue, then those allegations not replied to must be taken to have been accepted. See also *Esa bin Sayon v. Wong Kim Poh* [1985] 2 CLJ 382 and *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45.

[50] The appellant avers that the foreign currencies found in his premise belonged to his family members and were collected during their frequent overseas travels. The appellant had exhibited copies of his family's passports from 2010 and his declaration to show the frequent official travelling and vacations that he and his family had done. The appellant could not be put to prove that the foreign currencies do not originate from the money. It is the respondent who has to prove that the foreign currencies form part of the money that relate to an offence under the Act. The respondent did not refute the appellant's averment as to this fact in their reply. In *PP v. Kuala Dimensi Sdn Bhd & Ors* [2019] 3 CLJ 650, the Court of Appeal through the judgment of Suraya Othman JCA found *inter alia* that the IO failed to rebut or close the gaps in the investigation. The court stated:

> [70] From our perusal, we find that the PP through the investigating officers merely produced *via* their affidavits allegations of facts and charges brought against third parties (Datin Paduka OC Phang, Law Jhen Dong, Bernard Tan and Stephen bin Abok) who have all been acquitted and discharged.
>
> [71] At the same time, the PP had failed to disclose and provide the names, identity and sources of information that they had received and relied upon and the reasons for their belief in such information and the involvement of each of the respondents to these charges. This is relevant since the PP had submitted that the four accused on a balance of probabilities had committed money laundering. If the four accused had committed money laundering, then in what manner has all the respondents abetted them.
>
> [72] The investigating officers have also failed to disclose all of the documents relied upon by them in coming to their conclusions or as to their reasons for having relied on the documents as being a true reflection of the facts alleged.
>
> [73] Accordingly, it is impossible for the PP to have "been satisfied" that the bringing of the application was appropriate, under the circumstances. The PP should have set out in Saifuddin's first affidavit the evidence that he relied on to "satisfy himself" that:

(i) there are predicate offences committed by the four accused; and

(ii) that the proceeds derived therefrom had been used in the commission of an offence of money laundering.

[74] Further, in the first affidavit of IO Supt Rajagopal, he merely relies on the allegations in the police report in exh. RG-1 (pp. 742 to 750 of record of appeal (ROA) vol. 3(6)) lodged by Datuk Lee Hwa Beng to conclude that the predicate offences under s. 409 of the Penal Code has been made out against Datin Paduka OC Phang, and the predicate offence under s. 420 of the Penal Code has been made out against Law Jenn Dong, Bernard Tan Seng Swee and Stephen bin Abok.

[75] It is not disputed, as stated earlier, that the PP has conceded that no charges are being preferred against any of the respondents for an offence under s. 4(1) of the AMLATFA. The said decision was arrived at after the PP had scrutinised all of the investigation papers referred to in Saifuddin's first affidavit, Supt Rajagopal's first affidavit and Willey's first affidavit.

[76] In this regard, the only averment that the PP maintains and said repeatedly is that charges have been preferred against Datin Paduka OC Phang, Law Jenn Dong, Bernard Tan Seng Swee and Stephen bin Abok. The charges were not exhibited in the affidavits but were merely appended with the written submission of the PP.

[77] It is important to note, as stated earlier, that the charges against Datin Paduka OC Phang were withdrawn by the PP and the Sessions Court had ordered the acquittal and discharged of Datin Paduka OC Phang.

[78] Further, the Sessions Court had not called upon the defence and had acquitted and discharged Law Jenn Dong, Bernard Tan Seng Swee and Stephen bin Abok on 17 March 2017.

[79] It is thus insufficient for the PP to say, that just because the four accused had been charged, that in itself without more, is sufficient to establish that on a balance of probabilities, an offence of money laundering under sub-s. 4(1) of AMLATFA had been committed by them.

[80] Further, we agree with the High Court Judge that the PP has also failed to identify the nature and extent of the participation of the respondents with the offence of money laundering. Since the PP has argued that the four accused had committed money laundering, the PP has also failed to show in what manner the respondents has abetted the four accused.

[81] In this context, IO Supt Rajagopal has not tendered any other substantive evidence to support his findings that an act of money laundering has been made out under items (a), (b) and (c) of the definition of money laundering under s. 3 of the AMLATFA. IO Supt Rajagopal has also not laid down the factors which give rise to the inference of intent or *mens rea* as described in items (aa) and (bb) of the definition of money laundering under s. 3 of the AMLATFA.

[82] Instead, in his affidavit, IO Supt Rajagopal, simply begins most of his averments by saying that "my investigation reveal that …". IO Supt Rajagopal, also does not describe whose statements were taken as part of his investigation and what were the effect and purport of the said statements. IO Supt Rajagopal, also has failed to tender or describe the nature and contents of any of the statements that he recorded under the AMLATFA.

[83] The situation would have been different had the PP adduced the statements that were recorded to prove the predicate offence under s. 32(2) of the AMLATFA which reads as follows:

Power of an investigating officer

31. (1) Where an investigating officer is satisfied, or has reason to suspect, that person has committed an offence under this Act, he may, without a search warrant:

(a) stop, enter, board, inspect, detain and search any conveyance for any property, document or information;

(b) enter, inspect and search any premises belonging to or in the possession or control of the person of his employee, and in the case of a body corporate, its director or manager for any property, document or information;

(c) break open, examine and search any article, container or receptacle found in any premises or conveyance that is being searched;

(d) detain, take possession of, and remove from the premises or conveyance any property, document or information found in the premises, conveyance, article, container or receptacle. And detain it for such period as he considers necessary;

(e) inspect, make copies of or take extracts from any document or information so detained;

(f) search any person who is in, or on, such premises or conveyance, if the investigating officer has reason to suspect that the person has on his person any property, document or information, including personal documents, which in the opinion of the investigating officer are necessary for the purpose of an investigation into an offence under this Act and detain anything found on such person.

(2) An investigating officer may order, orally or in writing, any person whom he believes to be acquainted with the facts and circumstances of the case:

(a) to attend before him for examination;

(b) to produce before him any property, document or information; or

(c) to furnish to him a statement in writing made on oath or affirmation setting out such information as he may require.

[84] The question of privilege and any risks of disclosure causing any danger to the person giving any statement under s. 32(2) of the AMLATFA does not arise since there is no prosecution in the first place of any of the respondents. Hence the references made by the PP to authorities such as *Husdi v. PP* [1979] 1 LNS 33; [1979] 2 MLJ 304 (High Court) and [1980] 1 LNS 29; [1980] 2 MLJ 80 (Federal Court), *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* [2010] 4 CLJ 331 (Court of Appeal) is not relevant as those cases concerned applications made by an accused person for statements recorded under s. 112 of the CPC in ongoing criminal trials.

[85] In the present case, as stated earlier, it is not disputed that none of the respondents were charged for any offences. At the same time, as stated earlier, charges preferred against others such as Datin Paduka OC Phang were withdrawn while Law Jenn Dong, Bernard Tan Seng Swee and Stephen bin Abok were acquitted. Thus, there is no danger arising of any of the statements recorded being revealed as evidence in court.

[51] The court in *PP v. Thong Kian Oon & Ors* [2012] 8 CLJ 119 had held that:

It is trite law that an application made under section 56 of AMLATFA requires proper proof of relevant facts which in turn must be supported by admissible evidence.

[52] In *PP v. Billion Nova Sdn Bhd & Ors* [2016] 2 CLJ 763, the Court of Appeal through the judgment of Idrus Harun JCA (as he then was) had elucidated what is required to be proven by the Public Prosecutor before a forfeiture order could be granted pursuant to s. 4 of the AMLATFA. The court stated:

[50] In our judgment, to prove the offence under s. 4(1) of the AMLATFA, the predicate offence under s. 135(1)(g) of Act 235 must first be proved. Mere proof of payments from the principal customs area without more, is not sufficient to prove the predicate offence under s. 135(1)(g) of Act 235, hence the offence under s. 4(1) of the AMLATFA. We agree with the learned judge that in the modern business world, payments could be made or banked in from any bank account or any part of the world for sales, transactions or purchases made elsewhere, at the convenience or choice of the payer and payee. *We need only say on this aspect that it will not be a far-fetched conclusion to put in a nutshell that there could not be proceeds of an unlawful activity where such unlawful activity has not been proven.* There is not the slightest room for doubt that the appellant failed to prove that these cash deposits were proceeds of the offence of money laundering under s. 4(1). The learned judge correctly decided that these cash deposits were not sufficient to prove the offence, the appellant would have to prove that the duty free cigarettes were in fact sold in Miri and Kota Kinabalu before an order of forfeiture in respect of the various sums in the 24 bank accounts could be made. We are driven to the inevitable conclusion that since the offence was not proved, this court would not countenance the forfeiture of the money seized by the appellant. The learned DPP had contended that s. 119 of Act 235 would apply. We agree

A with the learned judge that the presumption in s. 119 of Act 235 does not apply to a forfeiture proceedings under the AMLATFA. The presumption under s. 119 of Act 235 only applies for the cause of forfeiture under the said Act. The forfeiture application in this appeal it must be stressed is under s. 56 of the AMLATFA. (emphasis added)

B **[53]** It is incumbent upon the respondent as the applicant in the Sessions Court to prove that the money was used in the commission of an offence under the Act. At the risk of repetition, no documentary evidence is exhibited to show the nexus between the allegation of corruption and the money. The respondent further failed to detect or trail the movement of the C money. The respondent merely relied on the witness statements pursuant to s. 53 of the Act. The connection of the money with the offence must first be proven by the respondent. In *PP v. Billion Nova Sdn Bhd & Ors* (*supra*) the Court of Appeal stated:

[31] We are mindful that the appellant had to prove pursuant to s. 56 of D the AMLATFA that the money which was sought to be forfeited was the subject matter or evidence relating to the commission of the offence under s. 4(1) thereof. The words 'the commission of such offence' appearing in s. 56(1) presuppose that an offence has been committed. But what the appellant had produced before the learned judge was merely the evidence relating to the cash deposits in Public Bank in Miri and Kota E Kinabalu and cash sales of duty free cigarettes. This evidence, the learned DPP submitted was sufficient as the appellant only needed to show that there was a link between the sums seized for the predicate offence and the AMLATFA case in order to satisfy the judge that the requirements under s. 56 had been fulfilled before a forfeiture order could be made. It might be apposite to be reminded on what this contention entails in the F context of evidential burden placed on the appellant under s. 56 in that the appellant in consequence is not required to show any proof of sale transactions of the cigarettes occurring in the principal customs area and that the circumstantial evidence of mere payments outside Labuan is sufficient to order for the forfeiture of the property in question.

G [32] The evidence led by the appellant in our judgment, has clearly left a serious gap in the appellant's case when considered in light of the mandatory requirements under s. 56 of the AMLATFA which we have deliberated upon earlier. The appellant in fact did not adduce any evidence that these cigarettes were transported and sold in Miri and Kota Kinabalu, being in the principal customs area, before it could be said that H customs duty was payable by virtue of s. 155(1)(c) of Act 235 and that, as it had not been paid, the respondents had committed the offence under s. 135(1)(g) of Act 235 hence the offence of money laundering under s. 4(1) of the AMLATFA. Neither did the appellant lead any evidence that the 82 payments made into the Labuan account were proceeds from the sales of duty free cigarettes transported from Labuan and delivered I in Miri and Kota Kinabalu.

[54] In regards to the handbags seized the appellant avers that the handbags are fake products of expensive brands. Some are second hand bags stated to have been purchased at factory outlets during the appellant's vacation with his family. The IO did not refute these facts nor produced any evidence to show that they are genuine product of the branded bags. Neither is there any evidence to show that the bags were purchased using the money. There is no obligation in law for the appellant instead to produce evidence that the bags are fake branded handbags. The obligation rests with the respondent, as they are the party who alleges and the fact that the respondent fails to refute the appellant's averment is fatal.

[55] The Court of Appeal in *PP v. Billion Nova Sdn Bhd & Ors* (*supra*) had concluded as follows:

> We would say in conclusion that it should be assumed that the court hearing an application had no knowledge about the facts surrounding the case. It was for each party to present the evidence. At the end of the proceedings, applying the civil burden of proof which is on the balance of probabilities, the winner would be the party that has successfully tipped the scale in its favour. *It is incumbent on the appellant to show on preponderance of evidence that all facts necessary to prove their case are presented and are probably true. The appellant needs only to prove their case which is more probable than the respondent. The evidence to which we have alluded to, standing on its own, is insufficient to support a conclusion that the monies in question are the proceeds of an unlawful activity which constitutes a money laundering offence under s. 4(1) of the AMLATFA*. The appellant, we find has failed to prove the case on the balance of probabilities to the level that we can safely say that we are satisfied that all the essential requirements in s. 56(1) of the AMLATFA have been established. (emphasis added)

Conclusion

[56] There has been insufficient judicial appreciation of the evidence on the part of the learned Sessions Court Judge even before the court assessed or consider the explanation given by the appellant. Reliance of what other witnesses had stated during investigation and on admission by the appellant without documentary evidence are insufficient to support a conclusion that the money had been obtained by the appellant as a result of or in connection with an offence under the Act.

[57] Premised on the above, this court allowed the appellants appeal. The decision of the Sessions Court was set aside.